FILE COPY

FILED
DEC 27 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 429

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR PETITIONER

J. Cookman Boyd, Jr.,
Henry M. Decker, Jr.,
Baltimore, Maryland,
Counsel for Petitioner.

TABLE OF CONTENTS

	Page
Reference to Opinion in the Court Below	1
Jurisdiction	2
Statement of the Case	2
Errors Below Relied on Here	9
Argument:	
I. The Trial and Conviction of a Negro Upon an Indictment Found and Returned By a Grand Jury on Which the Number of Negro Members Has Been Limited Solely on Account of Race or Color, Pursuant to an Established, Systematic and Continuous Practice, Is a Denial of the Equal Protection of the Laws as Guaranteed By the Fourteenth Amendment to the Constitution of the United States	10
II. Petitioner, By Showing a Long-Continued and Systematic Limitation of the Number of Negroes Selected for Grand Jury Service in the City of Baltimore, Made a *Prima Facie* Showing of Unconstitutional Racial Discrimination in the Selection of Grand Juries in the City of Baltimore, Which the State Failed to Rebut	20
III. Petitioner's Rights Were Prejudiced By the Trial Court's Rulings on Evidence at the Hearing on Petitioner's Motion to Quash the Indictment Against Him	25
IV. The Grand Jury Which Indicted Petitioner Was Not Selected in Accordance With the Methods Prescribed for the Selection of Grand Juries By the Charter and Public Local Laws of Baltimore City	29
V. Conclusion	30

TABLE OF CASES CITED

Akins v. *Texas*, 325 U. S. 398, 89 L. ed. 1692	10, 11, 13
Bush v. *Kentucky*, 107 U. S. 110, 27 L. ed. 354	10
Carter v. *Texas*, 177 U. S. 442, 44 L. ed. 839	10
Hale v. *Kentucky*, 303 U. S. 613, 82 L. ed. 1050	10
Hill v. *Texas*, 316 U. S. 400, 86 L. ed. 1559	10, 13, 20
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. ed. 1500	10
Neal v. *Delaware*, 103 U. S. 370, 26 L. ed. 567	10, 21
Norris v. *Alabama*, 294 U. S. 587, 79 L. ed. 1074	2, 10, 21
Patton v. *Mississippi*, 332 U. S. 463, 92 L. ed. Adv. Ops. 164	11, 20
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. ed. 757	10, 21
Rogers v. *Alabama*, 192 U. S. 226, 48 L. ed. 417	10
Smith v. *Texas*, 311 U. S. 128, 85 L. ed. 84	10, 11, 20
Strauder v. *West Virginia*, 100 U. S. 303, 25 L. ed. 664	10
U. S. ex rel. Jackson v. *Brady*, 47 F. Supp. 362 (D. C. 1942)	22

Page

U. S. ex rel. Jackson v. *Brady*, 133 F. 2nd 476 (CCA 4) 22
Virginia v. *Rives*, 100 U. S. 313, 25 L. ed. 667 10

STATUTES CITED

Charter and Public Local Laws of Baltimore City (1938 Ed.), (Sections 687, 689, 694 and 709) 8, 9
Constitution of the United States, Fourteenth Amendment 9, 10, 11
United States Code:
Revised Title 28, Sec. 1257 (3) and Sec. 2106 2
United States Code, Annotated:
Title 28, Sec. 344 (b) .....
United States Judicial Code, Sec. 237 (b) .....
43 Stat. 937 .....

POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 429

SAM ZIMMERMAN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

Opinion in the Court Below

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It appears in 59 A. 2d 675, at pages 194-206 of the Transcript of Record,[1] and at pages 67-75 of the printed Record.[1] The opinion of the Crim-

[1] The term "Transcript of Record" and symbol "Tr." as used throughout this brief refer to the complete typewritten Transcript of Record as certified to this Court by the Court of Appeals of Maryland. The term "Record" and symbol "R." shall be used to refer to the printed portions of the Record, as filed by petitioner and respondent in the Court of Appeals of Maryland, and the opinion of that Court, and which now constitute the printed record in this Court.

inal Court of Baltimore City was an oral one, and appears at pages 175-189 of the Transcript of Record, and at pages 1-9 of the Record.

Jurisdiction

The final decision of the Court of Appeals of Maryland, the court of last resort in that State, affirming the judgment of the Criminal Court of Baltimore City, was entered on June 16th, 1948. Certiorari to review the judgment of the Court of Appeals of Maryland was granted by this Court on November 22nd, 1948, upon a petition therefor filed on September 13th, 1948, and based upon Section 1257 (3) and Section 2106 of revised Title 28, United States Code.

As to the jurisdiction and duty of this Court to make an independent determination as to underlying questions of fact, where the claim is made that a Federal right has been denied, see *Norris* v. *Alabama*, 294 U. S. 587, 590; 79 L. Ed. 1074, 1077, and cases there cited.

Statement of the Case

Petitioner, a Negro citizen, was indicted by a grand jury of the State of Maryland for Baltimore City, composed of twenty-two white men and one Negro, on or about September 5th, 1946, charged with the crime of murder (Tr. 4-6). A motion to quash the indictment was seasonably filed by Court-appointed counsel for petitioner (Tr. 7-10, and, after hearing, the Criminal Court of Baltimore City overruled said motion on April 21st, 1947 (Tr. 189; R. 9). On the same day, petitioner pleaded Not Guilty, elected to be tried by a judge without the aid of a jury, and was convicted of murder in the first degree. Petitioner's motion for a new trial was overruled by the Supreme Bench of Baltimore City, and, on December 5th, 1947, petitioner was sentenced to life imprisonment in the Maryland Penitentiary. On December 15th, 1947, petitioner noted an appeal to the

POOR COPY

Court of Appeals of Maryland where, after the filing of briefs and argument, the judgment of the lower court was affirmed (Tr. 206; R. 75).

The Supreme Bench of Baltimore City, consisting of a Chief Judge and ten associate judges, selects a grand jury for the City of Baltimore for each of the three terms of court (January, May and September) in every year, each grand jury being selected shortly before the beginning of the term in which it is to serve. Such grand juries are always composed of twenty-three members.

At the hearing on petitioner's motion to quash the indictment, the method and system of selecting grand jurors for Baltimore City were fully testified to by the Jury Clerk of the Supreme Bench of Baltimore City, who had served for more than 20 years in that position, by the Deputy Clerk of the Supreme Bench of Baltimore City, and by the present Chief Judge and two associate judges of the Supreme Bench of Baltimore City. Petitioner tendered and re-tendered the testimony of a former Chief Judge and three former associate judges of the Supreme Bench, but, upon objection by the State, the tenders were refused by the court.

Testimony produced at the hearing on petitioner's motion to quash the indictment brought to light the following significant facts:

The grand jury for the May term, 1946, which found and returned the indictment against petitioner, was composed of twenty-two white men and one Negro (Tr. 25). From the year 1910, up to and including the grand jury for the May term, 1946, on every grand jury there has served no more and no less than *one* Negro, with two exceptions, both in 1945, when two Negroes served on each of two grand juries (Tr. 39-40, 170-171; R. 11, 46). *Thus, in 36⅔ years, out of 110 grand juries for Baltimore City,*

108 have had one Negro member, 2 have had two Negro members, and none of the grand juries has had no Negro member.

Two Negroes were actually selected for the May term, 1946, grand jury, but both of these Negroes asked to be excused, and a white man and a Negro were selected as substitutions, only one Negro, therefore, actually serving (Tr. 171; R. 46-47).

As to the method by which grand juries are selected, the following was shown:

Associate Judge J. Abner Sayler, who has served on the Supreme Bench since 1937, testified that, since he has been on the Bench, grand juries "have been selected in one manner" and that he knows of nothing unusual about the selection of the grand jury for the May term, 1946 (Tr. 141; R. 36).

Chief Judge W. Conwell Smith testified that the method of selecting grand juries has been the same since 1938, when he came on the bench (Tr. 47-48; R. 13). After the trial court had afforded Judge Smith the unusual opportunity of going over the incomplete record in the case, after he and the other judges had testified (Tr. 167; R. 44), Judge Smith, of his own volition, reappeared as a witness and testified, from a prepared statement, that "While it is true, as I have already stated, that the method of selecting the Grand Jury has been the same ever since I have been a member of the Bench, yet it is also true that the use made by Judges of the method has changed and a somewhat different result produced." (Tr. 169; R. 45) Except for the showing that two Negroes served on each of two grand juries in the year 1945, there is no evidence from any other source to support this latter statement by the Chief Judge.

POOR COPY

The Record shows that it has been the custom for the ten associate judges of the Supreme Bench of Baltimore City, in advance of each term of court, to submit to the Chief Judge certain names of persons they feel are qualified to be members of the grand jury (Tr. 48; R. 13). These suggested names are referred by the Chief Judge, in turn, to the Jury Clerk (Tr. 48; R. 13) in the form of a composite list of all the suggested names (Tr. 53; R. 16). On this composite list the name of each Negro is indicated by a "C" or "Col" placed beside his name (Tr. 37, 44-45, 88; R. 12). The Jury Clerk, upon receipt of this list of suggested names, investigates the persons whose names are thus submitted (Tr. 53; R. 16), checks with the Criminal Court and the Supervisors of Elections in order to find out the color of the persons suggested (Tr. 44; R. 12), and reports their age, occupation, home address, whether they have served on juries before, if so, where, and other like information (Tr. 53; R. 16). The original list is then re-copied by the Jury Clerk, the information added, and, again, on this re-copied list, the names of all Negroes are distinguished by the letter "C" (Tr. 38, 53-54, 156; R. 17). Each of the judges (Tr. 26) then receives a copy of the re-copied list in the form of a "report list which is confidential", such list showing a "designation as to members of the Negro race." (Tr. 156) The Jury Clerk, in addition, turns over to the Clerk of the Supreme Bench, together with a list of 700 or 750 names of qualified petit jurors (Tr. 20-21; R. 10), a copy of the revised list of names suggested for grand jury duty, the expression "Grand Jury Nominations" appearing at the top of said latter list (Tr. 104; R. 23). The Clerk of the Supreme Bench, upon receipt of these two lists from the Jury Clerk, puts them in the current Jury Book and appends a certification to be subsequently signed by the Judges of the Supreme Bench indicating that the names on the lists are

qualified to serve as grand and petit jurors. When the Supreme Bench meets, the Clerk of the Supreme Bench takes the Jury Book, along with the unsigned certification of the names, to the consultation room where the judges confer (Tr. 104; R. 23). The lists of names are on the table at the Supreme Bench meeting (Tr. 57; R. 18), and some of the judges look through the list and others refer to their own files in making selections for the grand jury (Tr. 57-58; R. 19). In considering the list of prospective jurors for the selection of the grand jury, there is no particular mode of procedure. According to the testimony of Chief Judge Smith, the selections are made by all the judges and are passed upon by all the judges, with the result that the selection of the grand jury is by the unanimous action of all the judges at the meeting, there being a free and frank discussion among the judges as to the qualifications of persons to serve on the grand jury (Tr. 67). The names of Negroes finally selected for the grand jury, according to the testimony, are not suggested by any one judge (Tr. 41-42), nor by the senior member of the Bench who, before his ascendancy to the Bench, was a member of the Republican Party, although "he might think so" (Tr. 69; R. 20), and this has been so at least *since* May, 1946 (Tr. 141; R. 36). Evidence to contradict this latter testimony, offered through four former judges of the Supreme Bench, covering the years 1922 to 1945, was rejected (Tr. 130-138; R. 30-35; and Tr. 141-143; R. 36-37).

Although it was testified by Chief Judge Smith that the selections for the grand jury are made from the combined list of grand and petit jury nominations, and are not restricted to the list of names suggested by the judges solely for grand jury service (Tr. 50, 70; R. 15, 21), *in each and every instance since 1940* (records prior to that time being unavailable [Tr. 113-114]), including the grand jury which

POOR COPY
BLEED THROUGH

indicted petitioner (Tr. 114; R. 27), the names of the grand jurors ultimately selected, *without exception*, appeared on the list of names suggested to the Chief Judge by the associate judges for grand jury service. Only on four single occasions did a name selected for the grand jury appear on both the list of judges' nomination *and* the 700 or 750 name list of petit jurors (Tr. 116; R. 28). On one of these four occasions there were two names appearing on both the list of about 50 names suggested by the individual judges and on the 700 or 750 name list selected by the Jury Clerk (Tr. 117; R. 28). The grand jury for the May term, 1946, which indicted petitioner, included one name which happened to appear on both lists (Tr. 114-115; R. 27).

After the judges have selected the grand jury, the Clerk of the Supreme Bench is called to the door of the consultation room by the judge who acts as Secretary of the Supreme Bench (Tr. 108; R. 24) and is handed the list of around fifty names (Tr. 110; R. 25), marked in pencil indicating the numbers one to twenty-three (Tr. 109; R. 24). The Supreme Bench Clerk then types the twenty-three names, as marked, on an order and returns the order along with the sheets of paper with penciled numbers on them to the Secretary (Tr. 109; R. 24). The list of 700 or 750 names selected by the Jury Clerk for petit jury service remains in the consultation room all this time (Tr. 110; R. 25).

After the Supreme Bench meeting has adjourned, the Clerk of the Supreme Bench goes into the consultation room and gets the Jury Book. At that time he finds that it has been signed by the judges (Tr. 113; R. 26).

The names remaining on the grand jury nominations list after the selection of the twenty-three grand jurors are *not* put into the wheel from which the petit juries are drawn, although the Baltimore City Charter (Sec. 694)

requires that *all* names remaining after the selection of the Grand Jury shall "be inscribed upon ballots, which * * * shall be placed * * * in a drawing wheel * * *." The only names which go into the wheel are those appearing on the 700 or 750 name list selected by the Jury Clerk (Tr. 90; R. 23).

The *published* list of grand jurors, as ultimately selected, carries no designation indicating that the person is or is not of the Negro race (Tr. 54, 98-99; R. 17), nor does the letter "C" appear on the *published* list of petit jurors (Tr. 186; R. 7).

When Negroes selected for grand jury duty are excused from serving, substitutions invariably are selected only from the list of names suggested by the individual judges as qualified grand jurors (Tr. 33; R. 11).

Negroes constitute approximately 19% of the population of the City of Baltimore (Tr. 145; R. 38).

The method of selecting grand and petit juries is prescribed by the Charter and Public Local Laws of Baltimore City (1938 Ed.)[2].

---

[2] "The Judges of the Supreme Bench of Baltimore City, or a majority of them, shall * * * select fairly and impartially, and by the exercise of their best judgment, the names of seven hundred and fifty persons, or thereabouts, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore * * *" (Secs. 687, p. 394).

"The said list of persons, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore, having been prepared as aforesaid, it shall be the duty of the said Judges of the Supreme Bench of Baltimore City, or a majority of them, * * * to select from said list the names of twenty-three persons, who shall constitute and be the grand jurors for the City of Baltimore for the ensuing term of said Criminal Court of Baltimore; * * *" (Sec. 689, p. 395).

"The said Judges of the Supreme Bench * * * shall, * * * after the selection of the grand juries for the City of Baltimore, as provided in Section 689, cause all the names selected by the Judges as aforesaid, remaining upon said list of qualified jurors, to be inscribed upon ballots, which * * * shall be placed by one of such Judges, with his own hands, on the day of said meeting and immediately before the drawing herein provided for, in a drawing wheel to be provided for that pur-

POOR COPY

BLEED THROUGH

Errors Below Relied On Here

Petitioner relies on the following points:

1. The Trial and conviction of a Negro upon an indictment found and returned by a grand jury on which the number of Negro members has been limited solely on account of race or color, pursuant to an established, systematic and continuous practice, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Petitioner, by showing a long-continued and systematic limitation of the number of Negroes selected for grand jury service in the City of Baltimore, made a *prima facie* showing of unconstitutional racial discrimination in the selection of grand juries in the City of Baltimore, which the State failed to rebut.

3. Petitioner's rights were prejudiced by the trial court's rulings on evidence at the hearing on petitioner's motion to quash the indictment against him.

4. The grand jury which indicted petitioner was not selected in accordance with the methods prescribed for

---

pose by the Sheriff of Baltimore City, under the direction of said Judges; * * *" (Sec. 694, pp. 397-398).

"All the provisions of this sub-division of this Article relating to the mode of drawing and summoning jurors shall be construed as directory merely, and no indictment or presentment for any felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment or presentment, whether after verdict, by confession or otherwise, be stayed or reversed, nor shall any challenge to the array of jurors be allowed because of any failure by the Judges, or the clerks, or the Sheriff, to comply with the provisions of law relating to the drawing of jurors in the City of Baltimore; provided, nevertheless, that if any officer concerned in the drawing of said jurors shall willfully neglect to perform any duty imposed upon him by law, he shall be liable to indictment in the Criminal Court of Baltimore, and upon conviction shall be fined the sum of one thousand dollars (Sec. 709, pp. 405-406).

the selection of grand juries by the Charter and Public Local Laws of Baltimore City.

Each of the above points was decided, both by the trial court and the Court of Appeals of Maryland, erroneously in favor of the State and against petitioner.

ARGUMENT

I

The trial and conviction of a Negro upon an indictment found and returned by a grand jury on which the number of Negro Members has been limited solely on account of race or color, pursuant to an established, systematic and continuous practice, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The principle that the systematic and arbitrary *exclusion* of Negroes from jury panels solely because of their race or color constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution has been long established by the decisions of this Court.

Strauder v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664;
Virginia v. *Rives*, 100 U. S. 313, 25 L. Ed. 667;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567;
Bush v. *Kentucky*, 107 U. S. 110, 27 L. Ed. 354;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Rogers v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417;
Hollins v. *Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500;
Hale v. *Kentucky*, 303 U. S. 613, 82 L. Ed. 1050;
Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Smith v. *Texas*, 311 U. S. 128, 83 L. Ed. 84;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692;

POOR COPY
BLEED THROUGH

Patton v. *Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164.

The principle has been applied with equal force whether the discrimination has occurred by virtue of a statute (*Strauder* v. *West Virginia, supra*; *Bush* v. *Kentucky, supra*) or by the action of administrative officers (*Neal* v. *Delaware, supra; Carter* v. *Texas, supra*), and whether the exclusion is from service on petit juries (*Strauder* v. *West Virginia, supra; Norris* v. *Alabama, supra*) or on grand juries (*Carter* v. *Texas, supra; Smith* v. *Texas, supra*).

And, the decisions of this Court make it clear that an arbitrary and systematic *limitation* of the number of Negroes selected for grand jury service, as well as *total exclusion*, is in contravention of the Fourteenth Amendment to the Federal Constitution.

Smith v. *Texas*, 311 U. S. 128, 85 L. Ed. 84;
Akins v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692.

It is contended by petitioner that the Court of Appeals of Maryland in its decision in this case failed to follow the long line of applicable decisions of this Court. The Maryland Court of Appeals particularly refused to recognize the binding significance of this Court's opinion in the case of *Smith* v. *Texas, supra;* and, moreover, petitioner earnestly maintains that the Court of Appeals of Maryland misconstrued the theory upon which this Court decided the *Akins* case, *supra.*

Reference to the petition for certiorari in the *Smith* case shows that the "sole question for decision" raised by the petitioner there was:

> "Must a negro defendant in a State Criminal Court introduce evidence showing a *total exclusion* of members of his race from grand juries in order to establish a violation of the equal protection clause of the Fourteenth Amendment? In other words, may officers of a

> State tribunal cover up their intended discrimination against the negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment?" (p. 4 of Petition for Writ of Certiorari, *Smith* v. *Texas, supra,* 311 U. S. 128, 85 L. Ed. 84).

This Court, in reversing the conviction of the petitioner in the *Smith* case, recognized in its opinion that there had not been a *total exclusion* of Negroes:

> "• • • Chance and accident alone could hardly have brought about the listing for grand jury service of *so few* negroes • • • (Italics supplied).

Actually, it is believed by petitioner that this Court used the term "exclusion" in the *Smith* case synonymously with "limitation", for it follows that if there has been a *limitation* of Negroes, some Negroes have been excluded.

A careful reading of Mr. Justice Black's opinion in the *Smith* case indicates that the test there applied by this Court actually was not one of *exclusion* or *limitation;* but, on the contrary, the *Smith* case was decided on the broader question of whether or not the evidence showed *discrimination.*

> "• • • If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." (*Smith* v. *Texas, supra,* 311 U. S. 128, 132; 85 L. Ed. 84, 87).

And, it is respectfully submitted, the question of whether or not Negroes have been *discriminated against* in the selection of grand juries in the City of Baltimore is the test which should be applied by this Court here; not whether Negroes have been *limited* or *excluded,* but whether there has been *discrimination.*

In determining whether there has been such discrimination, this Court is not bound by the findings made by the lower court, but has the jurisdiction and the duty to make

POOR COPY

BLEED THROUGH

an independent inquiry and determination of the disputed facts, especially where the conclusions of the lower court are so lacking in support in evidence that to give them effect "would work that fundamental unfairness which is at war with due process."

Akins v. *Texas, supra;*
Smith v. *Texas, supra;*
Pierre v. *Louisiana, supra;*
Norris v. *Alabama, supra.*

The case of *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692, brought before this Court no novel question. The *Akins* case must be considered, as this Court did in fact consider it, in connection with the earlier case of *Hill* v. *Texas*, 316 U. S. 400, 86 L. ed. 1559, where the conviction of a Negro defendant was reversed because of racial discrimination in the selection of grand jurors. In the *Akins* case, this Court expressly recognized the fact, as was shown by the evidence, that

> "• • • the courts of Texas • • • endeavored to comply with the Federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159, supra. Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color."

Thus, in the *Akins* case, evidence of a *continual* and *systematic* discriminatory exclusion or practice was found to be lacking, because the method so obviously followed by the Texas courts prior to the *Hill* case was found by this Court to have been abandoned subsequent to the *Hill* case.

As was pointed out by Mr. Justice Reed in the *Akins* case, the grand jury which indicted the petitioner Akins was but the second grand jury selected after the *Hill* case.

> "• • • Purposeful discrimination is not sustained by a showing that *on a single grand jury* the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue *a course of conduct* which results in discrimination 'in the selection of jurors on racial grounds'. Hill v. Texas, supra, (316 U. S. 404, 86 L. ed. 1562, 62 S. Ct. 1159). Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on *the theory that their continual exclusion indicated discrimination* and not on the theory that racial groups must be recognized. Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159, and Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164, all supra. The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present *which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.* • • •" (Italics supplied.)

It may be readily seen that the *Akins* case involved a *single* grand jury. The "continual" and "systematic" discrimination required by the decisions of this Court was not, and could not be, shown in the *Akins* case because of

POOR COPY

BLEED THROUGH

the definite, proven change which had taken place in the Texas method for the selection of grand jurors.

Chief Justice Stone, Mr. Justice Black and Mr. Justice Murphy dissented from the majority opinion in the *Akins* case. In the dissenting opinion, written by Mr. Justice Murphy, it was said:

> "*Racial limitation no less than racial exclusion* in the formation of juries is an evil condemned by the equal protection clause. 'The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.' * * *" (Italics supplied.)

It is believed by petitioner that the dissenting Justices were not dissenting in any way from the majority opinion so far as the above language is concerned. It is believed that Mr. Justice Murphy, in the dissenting opinion, was merely re-stating a principle of law recognized by the majority of the Court in the *Akins* case. It was in the *application* of this principle that the dissenting Justices differed in opinion from the majority of the Court. The majority felt the principle should not be applied to "a single grand jury"; Justices Stone, Black and Murphy apparently felt that it should be so applied.

The Court of Appeals of Maryland, however, shows in its opinion a failure to understand the scope of the decision in the *Akins* case, and consequently has gone astray in applying fundamental constitutional principles to the facts of petitioner's case.

In the matter now before this Court, petitioner has shown "a course of conduct" resulting in discrimination; petitioner has shown a "continual" and "systematic exclusion of eligible jurymen of the proscribed race," and petitioner has shown an "unequal application of the law to such an extent as to show intentional discrimination," all proper

criteria in determining the presence *vel non* of discrimination, according to the *majority* opinion in the *Akins* case.

The Court of Appeals of Maryland, in its opinion, has made obscure the startling statistics which were proved by petitioner. Judge Henderson lays stress upon the number of Negroes selected by the Jury Clerk for the "list of 750." The so-called "list of 750" has absolutely no bearing on this case, under the evidence, because petitioner proved that in every instance within the scope of available records of the Supreme Bench grand jurors have been selected only from the so-called "list of 50 names," composed of the personal nominations of the various judges. The true picture, as it should be viewed by this Court, is that from the year 1910 in Baltimore City, there have been 108 grand juries with one Negro member each, and 2 grand juries with two Negro members each. Whatever the process which produces such a result, the result nevertheless *prima facie* shows discrimination.

Further, the Court of Appeals of Maryland has seen fit to superimpose upon the decisions of this Court an additional test for finding evidence of discrimination. Judge Henderson says:

> "In the absence of proof of a long continued and *invariable* practice, the fact that only one Negro served on the particular jury is without significance. *Akins v. Texas, supra.*" (Italics supplied.)

This Court has never required the showing of an "invariable" practice as a necessary element of proof. On the contrary, in *Smith* v. *Texas, supra,* Justice Black, in expressing the unanimous opinion of this Court, specifically noted, in reversing the conviction:

> "• • • that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none."

POOR COPY

BLEED THROUGH

Surely, the above pattern is not "invariable." If it is, then the pattern followed by the Supreme Bench of Baltimore City for more than 36 years is egregious constancy exemplified.

The Court of Appeals of Maryland, in its opinion, apparently in an effort to bring this case within the theory of the *Akins* case, says:

> "• • • Mr. Folger's (the Jury Clerk) testimony that one, and only one, negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this result was not obtained by chance, but was dictated by policy. But any inference based on a mere numerical pattern is rebutted by the undisputed evidence that two negroes served upon each of two Grand Juries in 1945, and that the Grand Jury for the May Term, 1946, originally contained the names of two negroes who were excused from serving. *The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years.* If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946." (Italics supplied.)

To apply the false logic of the Court of Appeals of Maryland to the case of *Smith* v. *Texas, supra,* would require a finding that the pattern there shown was broken in several instances, hence no discrimination could be found. In other words, the only ***invariable*** pattern which this Court could have found in the *Smith* case would have been for the years 1937 and 1938, when there were consistently no Negroes selected for grand jury service. And, following the chain of logic to its conclusion, had this Court so found, there would have been no reversal in the *Smith* case, for there would have been no proof of a "systematic" and "continual" exclusion. Instead, the case would have fallen within the theory later expounded by this Court in *Akins* v. *Texas, supra.*

It should be noted further that the Court of Appeals of Maryland found a change *in the method* of selection of grand juries in Baltimore City *despite* the testimony of Chief Judge W. Conwell Smith, who testified (Tr. 47-48; R. 13); "The *method* of selecting a Grand Jury has been the same ever since I have been a member of the Bench. I came on the Bench in 1938. * * *", and *despite* the testimony of Associate Judge J. Abner Sayler, who has been a member of the Bench since 1937: "Frankly, Grand Juries since I have been here, have been selected in one manner and I know of nothing unusual about the selection of that (May Term, 1946) Grand Jury." (Tr. 141; R. 36)

It is true that Chief Judge Smith was allowed by the Court to testify again after having been given the opportunity of reviewing all the testimony at the hearing up until that time. When Judge Smith reappeared as a witness, he testified, using a prepared, written statement, as follows:

> "* * * While it is true, as I have already stated, that the method of selecting the Grand Jury has been the same ever since I have been a member of the Bench, yet it is also true that the use made by Judges of the method has changed and a somewhat different result produced. * * *" (Tr. 169; R. 45)

However, at no place in the record, including Judge Smith's testimony, is a change in the "use" of the method shown. Counsel for petitioner attempted to obtain definite proof of such a change, if any, but was prevented from doing so by the trial court (Tr. 140, 158; R. 35, 42), which nevertheless found such a change, despite the direct statements to the contrary by present members of the Bench. The trial court refused to consider the fact that for 36⅔ years in the City of Baltimore there have been 108 grand juries with one Negro member each, 2 grand juries with

POOR COPY

BLEED THROUGH

two Negro members each, and no grand juries with no Negro members, but instead restricted its consideration to grand juries since 1944, 1945 and *since 1946*, the year in which petitioner was indicted, on the apparent theory that at some unspecified time in 1944 or 1945 a *change* in the method of selecting grand juries occurred. The trial court obviously based its finding of a change in method on the vague, indefinite and irrelevant evidence that, since the appointment of a new Chief Judge (Smith) of the Supreme Bench in 1945, the Bench holds weekly luncheon meetings (Tr. 186; R. 7), out of which has grown "a close, intimate relationship" (Tr. 187; R. 8) among the members of the Bench, and at which various problems, including the method of selecting jurors, are *discussed* (Tr. 186; R. 7).

Among other reasons cited by the trial court as indicating the change in the method of selecting grand jurors is the fact that the Supreme Bench has "taken an interest in the condition of the Court House so that there is presently to be placed before the public a loan for the reconstruction and modernization of the Court House." (Tr. 187; R. 7)

The trial court says in its oral opinion (Tr. 187; R. 8):

> "Now (1947), we are attempting to broaden the base out of which the whole jury list is made in order to bring in many persons who have not heretofore served. • • • That is a task which cannot be done in one day. We are working on it and a special committee of Judges is moving toward an increase in the basic lists not only as to any group but as to all citizens of Baltimore who are competent and able to serve, whether it be on a petit or Grand Juries. • • •"

The Court of Appeals of Maryland, however, chooses to rely on grounds other than the vague and obscure statements as to "weekly luncheon meetings" and improvements in the Court House in finding a change in the method of

selecting grand jurors. The Court of Appeals says (Tr. 203; R. 73):

> "• • • The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946."

In the record appears the unrebutted testimony of two present judges of the Supreme Bench that the method used for the selection of grand jurors in 1937 and 1938 has been the *same* ever since, yet the Court of Appeals finds that the method "is clearly not the same method".

II

Petitioner, by showing a long-continued and systematic limitation of the number of Negroes selected for grand jury service in the City of Baltimore, made a prima facie showing of unconstitutional racial discrimination in the selection of grand juries in the City of Baltimore, which the State failed to rebut.

The Court of Appeals of Maryland held that petitioner "failed to meet the burden of establishing a deliberate and intentional limitation on account of race or color, in the selection of the Grand Jury which indicted him, and that the finding of the trial court was supported by the weight of the evidence." (Tr. 206; R. 75).

Petitioner, on the other hand, respectfully maintains that a *prima facie* showing of unconstitutional racial discrimination has been made.

Patton v. *Mississippi*, 332 U. S. 463, 92 L. Ed. Adv. Ops. 164;
Hill v. *Texas*, 316 U. S. 400, 86 L. Ed. 1559;
Smith v. *Texas*, 311 U. S. 128, 85 L. Ed. 84;

POOR COPY
BLEED THROUGH

Pierre v. *Louisiana*, 306 U. S. 354, 83 L. Ed. 757;
Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074;
Neal v. *Delaware*, 103 U. S. 370, 26 L. Ed. 567.

For 36⅔ years—from 1910 up to and including the grand jury for the May term, 1946—one Negro has served on each of 108 grand juries, while two Negroes have served on each of 2 grand juries. It is undisputed that Negroes constitute about 19% of Baltimore's total population of nearly a million persons, so that it can hardly be said that there has been a lack of qualified Negro eligibles for jury service. Nor did the State attempt to account on such a basis for the limited number of Negro grand jurors. Chief Judge Smith, on the contrary, testified (Tr. 52; R. 16):

> "• • • I regard it as a pure coincidence that the number of colored men on the Jury has most usually been restricted to one member. • • •"

The Court of Appeals, however, justifies its decision in part on the unavailability of qualified Negroes, a position never adopted by the judges of the Supreme Bench who testified at the hearing on petitioner's motion. As a matter of fact, such a position would be and is extremely difficult to explain, for it was testified that on every list of nominations for the grand jury there were from four to eight Negroes (Tr. 40; R. 12). Yet, regardless of the varying number of Negroes nominated on the lists of names, in 36⅔ years there were only two occasions when the ratio of 22 whites to one Negro was departed from, and then only to the extent of making the ratio 21 to 2. It is a matter of common knowledge that since 1910 the Negro—especially the urban Negro—has made great strides economically and educationally. The ups and downs in employment, times of war and peace, changes in population—none has had an effect on the number of Negroes selected for grand jury service in Baltimore.

Judge Henderson, in speaking for the Court of Appeals, goes to great length to set forth the findings of Judge Chesnut, sitting in the District Court, in the case of *U. S. ex rel. Jackson* v. *Brady*, D. C. 1942, 47 F. Supp. 362, where the question considered was whether there had been a systematic exclusion of eligible Negroes from the *petit juries* in Baltimore. Judge Henderson fails to note in his opinion, however, that, in the very same case, Judge Soper, speaking for the United States Circuit Court of Appeals, Fourth Circuit, said with regard to the *grand jury* in Baltimore (133 F. 2nd 476):

> "• • • *Except as to the Grand Jury*, whose organization was not challenged in this case, no discrimination can be found, • • •." (Italics supplied).

There can be no inference drawn from the facts as disclosed by the record in this case other than that a discriminatory course of conduct has been followed by officials charged with the selection of grand jurors in the City of Baltimore. As was said by this Court in *Hill* v. *Texas*, *supra*:

> "• • • Had there been evidence obtainable to contradict the inference to be drawn from this testimony, the state would not have refrained from introducing it, • • •."

In the present case, not only did the State refrain from introducing any contradictory evidence, but *counsel for petitioner* was prevented from asking questions which would have adduced such contradictory evidence, if any there had been (Tr. 140, 158; R. 35, 42).

The State of Maryland, at the hearing on petitioner's motion, made no explanation of the limitation of Negroes as shown by the evidence. The only rebuttal by the State consisted of the general statements by the Judges that no discrimination was intended. This, however, is insufficient

POOR COPY

BLEED THROUGH

to rebut the inescapable conclusions to be reached from the facts disclosed by the record.

> "• • • That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by *mere generalities.* If, in the presence of such testimony as defendant adduced, *the mere general assertions by officials of their performance of duty* were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. • • •" (Italics supplied) *Norris* v. *Alabama, supra,* p. 598.

We respectfully suggest that the impact of this record on a bench of the dignity of the Supreme Bench of Baltimore City would have brought forth specific and decisive proof of that point of time when, the manner in which, and the extent to which that bench had departed from a previous policy of limitation and discrimination, if in fact such evidence existed.

The conclusion is inescapable that there was no such proof available. Certainly it does not appear in the self-contradictory generalities of Chief Judge Smith. He first testified that the method of grand jury selection had been the same, to his knowledge, since 1938. After full opportunity to study the written record, and surely sensing the implications there contained, his written statement made at the time of his voluntary return to the stand offers no fact of any change in policy, purpose, or method. To say that the method was the same, but the use to which it was put was changed, and somewhat different results produced, is meaningless without further substantial specification. In the light of the proffered testimony of the four former judges, whose service on the Supreme Bench spanned more than 23 years (and continued up into 1945 in the case of

Judge O'Dunne), there can be no doubt that a deliberate policy of discrimination had been followed. This was clear to the Court of Appeals, who acknowledged it to be so, at least up to 1944. And yet the Court of Appeals was able to find evidence of a change of method in 1945 and 1946, without assistance from those most likely to know what change, if any, had actually taken place. Judge Sherbow, in the Criminal Court, certainly would have known the time, circumstances and extent of any change. Judge Sherbow did not hesitate to direct and lead the questioning of witnesses; yet he did not—we believe because he could not—direct attention to such a change. But there is more. If such an important change of policy had taken place, every judge of the Supreme Bench would have been fully aware of it, and the State could have conducted a parade of eleven judges to the witness stand to say when, where and how the system had changed. The two who did testify (C. J. Smith and Judge Sayler) affirmed the method as being without change.

Counsel for petitioner then attempted to assume, for the sake of clarity and certainty, a burden which clearly was that of the State. He attempted to ask another judge (Judge Emory H. Niles), who was called by the State, if there actually had been a change in policy or method since he, Judge Niles, had been on the bench (since 1938). The trial court refused to permit the witness to answer. This question and other similar ones, asked Judge Niles and Judge Sayler, and the trial court's rulings thereon, are considered more fully under Point III of this brief, *post*. They are referred to here as part of the complete failure by the State to rebut the long record of discrimination appearing from the affirmative proof.

The fact of two Negros on two juries in 1945 proves nothing, unless it is a slight change in the degree of discrimination. To change from a limit of one to a ceiling

POOR COPY

BLEED THROUGH

of two cannot, standing alone, erase 36 years of steadfast adherence to a policy of proscription. The silence of the bench, and the refusal by the trial court to permit the bench to be questioned on this point of particularity, stands as eloquent conviction that in fact no real, substantial and meritorious change had taken place.

III

Petitioner's rights were prejudiced by the Trial Court's rulings on evidence at the hearing on petitioner's motion to quash the indictment against him.

In the course of the hearing on petitioner's motion to quash the indictment, counsel for petitioner proffered the testimony of Judge Samuel K. Dennis, who was Chief Judge of the Supreme Bench from August, 1928, until August, 1944; the testimony of Judge Eugene O'Dunne, a member of the Supreme Bench from 1926 until 1945; the testimony of Judge Eli Frank, who served on the Supreme Bench from 1922 to 1944, and the testimony of Judge Duke Bond, who was a member of the Bench from 1922 to 1938 (Tr. 129-138; R. 30-35), all of whom retired from the Bench because of attainment of the constitutional age limit. All of these former judges were present in the courtroom at the time their testimony was offered (Tr. 138; R. 34).

With reference to Judge Dennis' testimony, counsel offered to show "that from 1928 through the greater part of 1944 it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one. I further tender to prove by Judge Dennis that it was the established, recognized, accepted and deliberate practice of the Supreme Bench accepting as its final selection as the colored mem-

ber of the Grand Jury that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench in those rare instances when there was more than one. * * *" (Tr. 135-136; R. 33).

Counsel offered to prove substantially the same facts by the testimony of the other ex-Judges for the periods during which they were members of the Supreme Bench (Tr. 136; R. 33).

The further offer was made to prove by the testimony of Judges Frank and Bond that on occasions they "suggested that there be a change in the method of selecting the colored members of the Grand Jury, particularly as to the number, and that the suggestion did not meet any favorable response on the part of the other members of the Bench." (Tr. 136; R. 33-34)

Counsel for petitioner further offered to prove by Judge O'Dunne that "on one occasion in his membership on the Bench he more or less innocently suggested the name of a proposed colored member and whether successful or not I do not at this time know, but that he was made to understand by other members of the Bench that that was not in accord with the recognized and carried out practice." (Tr. 136-137; R. 34)

In sustaining the State's objection to this testimony, the trial judge and (Tr. 132; R. 31):

> "* * * In explanation of the Court's sustaining the objection, I again call your attention to the fact that whatever may have been the practice prior to 1946, if that same system obtained in the May term, 1946, selection, then of course you could show a tradition and custom. But if that practice has changed after 1944, 1945, and in 1946 was not the custom that had existed prior thereto, then the testimony of Judge Dennis and the other members of the Bench who have retired, would have no application to this particular case."

POOR COPY

BLEED THROUGH

At this point in the proceedings, *no evidence whatsoever* had been adduced to show that the practice as to the selection of Grand Jurors had "changed after 1944, 1945," but on the contrary Judge Smith had testified unequivocally that "the method of selecting a Grand Jury has been *the same* ever since I have been a member of the Bench. I came on the Bench in 1938," (Tr. 47-48; R. 13) and there was no evidence presented subsequent to this ruling by the trial court to show that the system for selecting grand jurors was changed prior to May, 1946, when the grand jury which indicted petitioner was selected. On the contrary, Judge Sayler, a member of the Supreme Bench since 1937, later testified (Tr. 141; R. 36), "Frankly, Grand Juries since I have been here, have been selected *in one manner* and I know of nothing unusual about the selection of that (May, 1946) Grand Jury." The testimony of Judges Dennis, Frank, Bond, and O'Dunne was re-offered after Judge Sayler had testified and again the offer was refused by the Court (Tr. 142; R. 36).

It is earnestly maintained by petitioner that the trial court committed error—error highly prejudicial to petitioner's rights—when it refused to allow the ex-Judges to testify on both occasions when their testimony was offered. Nor is the prejudicial error cured by the statement of the Court of Appeals that "For the purposes of this appeal we shall treat the evidence proffered as though it had been admitted." (Tr. 203; R. 73) The Court of Appeals failed to note that Judge O'Dunne was a member of the Bench in *1945* (Tr. 136; R. 33), when the Court of Appeals finds that a change took place in the method of selecting jurors. Obviously his testimony would have been of the utmost importance.

Counsel for petitioner specifically asked Judge Sayler, a present member of the Bench: "• • • I would like

to ask you whether or not since you became a member of the Supreme Bench there has been any change in the method of the selection of the Grand Jury or the colored member thereof?" (Tr. 140; R. 35), but, upon objection, the trial court refused to allow the question.

Again, counsel for petitioner inquired of Judge Niles, a present member of the Bench: "Has there been any change in the practice of selecting Grand Juries particularly with respect to colored members thereon since you became a member of the Supreme Bench?" (Tr. 158; R. 42) Upon objection, the trial court again refused to allow the question, the answer to which would have certainly disclosed a change, if in fact any such change had occurred.

Petitioner, further is unable to comprehend the relevancy, if any, of the questions propounded by and the statements made by the trial court concerning the selection of Grand Juries *after* May, 1946, when the Grand Jury which indicted petitioner was selected.

On pages 64 and 65 of the Transcript (R. 19-20), the trial court related from the Bench how he and the Chief Judge attempted to obtain a colored man to serve on a grand jury. This was *subsequent* to the May term, 1946.

Again, the trial court asked Judge Sayler: "Have you taken unto yourself the naming of the colored members of the Grand Juries *since* May, 1946 to the exclusion of the other members of the Bench in their selection?" (Tr. 141; R. 36)

On page 150 of the Transcript (R. 39), Judge Niles is asked by Judge Sherbow: "What is the practice of the Supreme Bench in May, 1946, *and since* with respect to excusing persons from service on the Grand Jury if they find it too burdensome?"

On page 152 of the Transcript (R. 39), the court asks Judge Niles: "To what extent have you personally made

POOR COPY

BLEED THROUGH

nominations of members of the negro race for service on the Grand Jury *since* 1946?"

Again, on page 154 of the Transcript (R. 40-41), Judge Niles is asked by the court: "Do you know of any custom *since* 1946 by which one particular member of the Supreme Bench, who has been called in these proceedings the Republican member, makes the selection of the Grand Jurors who are members of the negro race?"

The Court of Appeals, despite the fact that the impropriety and irrelevancy of each of the above questions was called to its attention in brief and argument, makes no mention of such questions in its opinion.

The prejudice to petitioner in these erroneous rulings on evidence is so manifest as to require no further comment.

IV

The grand jury which indicted petitioner was not selected in accordance with the methods prescribed for the selection of grand juries by the charter and public local laws of Baltimore City.

The evidence shows that grand juries have not been selected in accordance with the provisions of the Baltimore City Charter, *supra*. Selections for the grand jury have been made not from the list of 750 names, but invariably from a list of about fifty names chosen and compiled in a manner quite different from that in which the names of petit jurors are selected and compiled. And, after the 23 grand jurors have been selected, the names remaining on the fifty-name list are not inscribed upon ballots and placed in a drawing wheel for possible selection as petit jurors. Yet the Court of Appeals finds that there has been a "substantial compliance" with the statutory provisions, although admitting that "the practice has departed somewhat from the procedure outlined in the Statute."

The Charter expressly provides by Section 709 (pp. 405-406) that the provisions relating to the selection of jurors are to "be construed as directory merely," and that no indictment shall be quashed because of any failure to comply with such provisions. Nor does petitioner seek to have the indictment against him quashed solely because of non-compliance with the Charter provisions. It is petitioner's contention that the failure to comply with the Charter provisions has been one of the factors permitting and contributing to the discrimination against Negroes which obviously has occurred. Although non-compliance with the Charter provisions in itself may not warrant the quashing of an indictment, discrimination against members of the Negro race in the selection of grand juries resulting, if only in part, from such non-compliance not only warrants but *requires* the quashing of an indictment found by one of such juries.

V

Conclusion

Discrimination *has* entered into the selection of grand jurors in Baltimore City. Petitioner has no means except through the testimony of the members (and ex-members) of the Supreme Bench, to ascertain the details of transactions occurring within the privacy of the Supreme Bench conference room, but petitioner has proved, nevertheless, by facts and testimony, that the number of Negro grand jurors has in fact been systematically limited. The system which has existed in the City of Baltimore, and the results produced by such system, cannot be satisfactorily explained or defended. This Court has denounced similar systems and similar results in many instances.

The guilt or innocence of petitioner should not and must not be allowed to interfere with or influence a decision in this case as to whether there has been a denial of Federal constitutional rights. No court is "at liberty to grant or

POOR COPY

BLEED THROUGH

withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. * * * Equal protection of the laws is something more than an absolute right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least-deserving as well as the most virtuous." *Hill* v. *Texas, supra.* As was pointed out in the *Hill* case, a prisoner whose conviction is reversed need not go free, if he is in fact guilty, for the State may indict and try him again by a procedure which conforms to constitutional requirements.

To require petitioner to spend the remainder of his life in the penitentiary as a result of judicial processes so obviously saturated by discrimination against members of his race is clearly a denial to him of the equal protection to which he is entitled under the Fourteenth Amendment. The fundamental theories of our democratic form of government necessitate that this Negro, as a citizen of this country, shall not be deprived of his rights by a discriminatory procedure which leaves in its trail a record, so replete with unanswered questions, unexplained facts, undeniable implications, and numerous judicial errors and inconsistencies.

It is respectfully submitted that this case, involving as it does the serious claim that petitioner has been denied the equal protection of the laws, calls for the exercise by this Honorable Court of its supervisory powers to the end that rights guaranteed under the Federal Constitution shall be respected and preserved.

J. Cookman Boyd, Jr.,
Henry M. Decker, Jr.,
Attorneys for Petitioner.